Carter

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Intera Technologies, Inc.

File: B-228467

Date: February 3, 1988

DIGEST

Nonresponsibility determination, based on conclusion that there was substantial risk that protester would not be able to obtain required permit in time for performance, was reasonable. Solicitation required compliance with specific aviation regulations and procuring agency was advised by licensing authority that protester would not be able to comply in time for performance. Procuring agency was entitled to rely on this advice and was not obligated to provide protester an opportunity to respond.

DECISION

Intera Technologies, Inc., protests the rejection of its offer by the United States Geological Survey (USGS) under request for proposals (RFP) No. 7280. The RFP was issued in conjunction with the USGS's side-looking airborne radar (SLAR) program, which uses SLAR technology to collect mapping data and information. Intera and Aero Services were the only offerors. The USGS could not affirmatively determine that Intera, a Canadian firm, would be able to obtain the permits needed to perform the contract and therefore found Intera nonresponsible. Intera contests this determination.

We deny the protest.

The RFP required that the aircraft used to perform the contract comply with all Department of Transportation (DOT) regulations, specifically including "section 14 of the Code of Federal Regulation, part 375 entitled 'Navigation of Foreign Civil Aircraft within the United States,' which appeared in the March 3, 1986 issue of the Federal Register." The cited section provided that no foreign contractor would be granted a part 375 license without consideration of reciprocity with respect to the licensing of United States contractors.

The USGS received two initial proposals on June 19, 1987, and best and final offers on August 14.

Because of a part 375 controversy involving Intera in conjunction with the prior year's SLAR program contract, the USGS met with DOT in September regarding Intera's compliance with the part 375 requirements under the current procurement, without which Intera would have been unable to perform. DOT advised the USGS that while simple permit applications could be processed fairly quickly, others could take a sustantial amount of time for decision, and that DOT would not issue a license to Intera to perform these services because Canada did not provide reciprocity to United States contractors. The USGS states that a recent Canadian Transportation Act, which would provide reciprocity, was also discussed with DOT, but that the effective date of the law was uncertain and DOT indicated that even if the act were effective in time for performance, DOT would want to wait for some time to see how it was implemented before changing its rules for domestic flights. On the basis of this information, the contracting officer determined Intera to be nonresponsible and awarded the contract to Aero on September 29.

Intera argues that the USGS's determination of nonresponsibility was unreasonable. Intera asserts that performance could be delayed until 1988 and that the contractor did not have to have the necessary permits at the time of award, so long as the contractor could obtain the necessary permits before commencing performance. Intera points out that the Canadian legislation that would provide reciprocity for American contractors was expected to be effective on January 1, 1988, and, presumably, would eliminate the basis for DOT's objections to granting Intera the needed permits.

Intera also contends that DOT's position regarding Intera as relayed to the USGS in September of 1987 was premised on a new interpretation of the reciprocity requirement to which Intera had no opportunity to respond, and argues that it therefore was unreasonable of the USGS to rely on this advice without affording Intera such an opportunity. The protester asserts that had it been allowed to respond, it could have demonstrated to the contracting officer that there was no reason that Intera could not have obtained the necessary permits before the need to begin performance in 1988.

The determination of a prospective contractor's responsibility involves a matter of business judgment, which is vested in the discretion of the contracting officer. We generally will not question a negative determination of responsibility unless the protester can demonstrate bad

faith on the agency's part or a lack of any reasonable basis for the determination. Elliott Co., B-224887.3, May 4, 1987, 87-1 CPD ¶ 465. To be reasonable (Intera has not alleged bad faith), a discretionary decision must reflect a reasoned judgment based on the investigation and evaluation of the evidence available at the time the decision is made. Apex International Management Services, Inc., 60 Comp. Gen. 172 (1981), 81-1 CPD ¶ 24.

Where the lack of license or permit could preclude performance, a contracting officer legitimately may inquire into an offeror's ability to obtain that license or permit in determining the offeror's responsibility. See What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD ¶ 179; VIP Limousine Service, Inc., B-225639, Jan. 29, 1987, 87-1 CPD ¶ 98, aff'd, 87-1 CPD ¶ 225. In our view, the USGS's inquiry into Intera's ability to comply with the part 375 requirements was appropriate and, on the basis of the information obtained, we cannot contest the reasonableness of the contracting officer's conclusion that there was a significant risk that Intera might not be able to perform the contract or of the accompanying negative determination of Intera's responsibility. The USGS was entitled to rely on DOT's representations, as the agency charged under with the responsibility for such determinations, see, e.g., Murray-McCormick Aerial Surveys, Inc., B-181099, Dec. 12, 1974, 74-2 CPD ¶ 325, and was not obligated to give Intera an opportunity to respond or to provide notice of the determination in advance of the award of the contract. Lithographic Publications, Inc., B-217263, Mar. 27, 1985, 85-1 CPD ¶ 357.

Moreover, we note that the Canadian Transportation Act provided for its effective date to be established by proclamation. While Intera may have been able, in September of 1987, to furnish some evidence that the proclamation was anticipated on January 1, 1988 (the act in fact was proclaimed in force as of that date), this would not have been conclusive and there is no evidence that it would have alleviated the USGS's concerns, particularly in view of DOT's indications that it wanted to study the implementation of the statute before changing the part 375 rules. In short, there is no evidence that this prediction would have changed the result in any event.

The protest is denied.

James F. Hinchman
General Counsel